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EX PARTE OR LATE FILED
MCI WORLD COM

Chuck Goldfarb
Director
Law and Public Policy

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May 22, 2000

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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MAY 22 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: *Ex parte* submission in CC Docket No. 96-98

Dear Ms. Salas:

Commission staff has asked WorldCom if there has been any experience at the state level that demonstrates that it is possible to convert to unbundled network elements (UNEs), under the conditions outlined in proposed Option 4 in WorldCom's *ex parte* submission of May 19, 2000, circuits used to provide local exchange service that had been purchased out of ILEC special access tariffs.

Both the Florida Public Service Commission and the Georgia Public Service Commission, in resolving complaints filed by MCImetro involving its interconnection agreement with BellSouth, have ordered BellSouth to convert to loop-transport UNEs, under the same conditions as outlined in Option 4, circuits consisting of loop-transport combinations that MCImetro has been forced to purchase out of BellSouth's special access tariffs.¹ In addition, both state commissions ordered BellSouth to refund to MCImetro the revenue difference generated by the between UNE and access rates retroactive to November 1997. The orders are attached to this letter.

As explained in the Georgia decision, at p. 3:

In this case, MCI uses the DS1 combo to connect its business customer to the wire center serving its local switch so that MCI can provide the customer with a full-featured local exchange service.

This is exactly the situation envisioned under Option 4.

¹ Before the Florida Public Service Commission, In re: Request for arbitration concerning complaint of MCImetro Access Transmission Services LLC for enforcement of interconnection agreement with BellSouth Telecommunications, Inc., Docket No. 981121-TP, Order No. PSC-99-1089-FOF-TP, issued May 27, 1999, and Before the Georgia Public Service Commission, In re: Complaint of MCImetro Access Transmission Services, LLC to Obtain DS1 Loop/Transport Combinations at UNE Prices, Docket No. 6865-U, dated May 2, 2000.

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Similarly, the Florida order describes (at p. 3) the DS1 dedicated transport as a "connection between the customer's serving wire center and a point of interconnection at MCI's local switch location." Although this language does not explicitly indicate where that point of interconnection will be, in practice most frequently it is at the serving wire center serving the MCI metro switch.

There have been no physical changes in the network resulting from the Florida order, nor will there be any physical changes under the Georgia order. In both states, these conversions just involve a billing change.

To date, BellSouth has refunded MCI metro \$8.5 million in Florida for these conversions of loop-transport combinations. This very sizeable conversion has occurred without any claim by BellSouth that MCI metro has tried to exploit the situation by converting special access circuits not used to provide local exchange service.

WorldCom would be happy to discuss this issue further. Please do not hesitate to contact me with any questions.

Sincerely,

A handwritten signature in cursive script that reads "Chuck Goldfarb".

Chuck Goldfarb
Director, Law and Public Policy

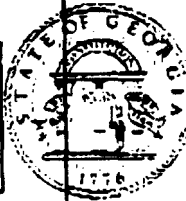
Enclosures

cc: Dorothy Attwood
Jordan Goldstein
Rebecca Beynon
Sarah Whitesell
Kyle Dixon
Larry Strickling
Jake Jennings
Jody Donovan-May

COMMISSIONERS:

BOB DURDEN, CHAIRMAN
 ROBERT B. BAKER, JR.
 DAVID L. BURGESS
 LAUREN "BUBBA" McDONALD, JR.
 STAN WISE

MAY 12 2000

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DEBORAH K. FLANNAGAN
 EXECUTIVE DIRECTOR

HELEN O'LEARY
 EXECUTIVE SECRETARY

Georgia Public Service

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MAY 02 2000

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Docket No. 6865-U

EXECUTIVE SECRETARY

In Re: Complaint of MCI Metro Access Transmission Services, LLC to Obtain DS1 Loop/Transport Combinations at UNE Prices.

ORDER ADOPTING HEARING OFFICER'S DECISION

On January 22, 1999, MCI Metro Access Transmission Services, LLC ("MCI") filed a Complaint against BellSouth Telecommunications, Inc. ("BellSouth"). MCI alleged that BellSouth breached the parties' Interconnection Agreement ("Agreement") approved by this Commission.

The Complaint requested that the Commission award the following relief:

- (1) Declare that the DS1 loop transport combination requested by MCI does not recreate BellSouth's MegaLink service or any other BellSouth retail service;
- (2) Order BellSouth to provide MCI with a credit equal to the difference between the price of the T1s that MCI ordered from the BellSouth access tariff to provision its customers' service from MCI switches and the price of a DS1 loop transport combination, for the period from November 1997 until the date of BellSouth's conformance with the Agreement;
- (3) Order BellSouth to provision all future requests by MCI for DS1 loop transport combination as UNE rates specified in the Agreement; and
- (4) Order such other and further relief as the Commission deems just and proper.

The Commission received a recommendation in this matter from the Hearing Officer who conducted the hearing, took the evidence, and certified the record to the Commission pursuant to O.C.G.A. Sections 46-2-58(d) and 50-13-17(a). A copy of the Hearing Officer's recommendation is attached hereto and incorporated herein by this reference.

A hearing took place before the Hearing Officer on August 26, 1999. Joseph Gilan and Ronald Martinez testified on behalf of MCI. Alphonso J. Varner and Jerry Hendrix testified on behalf of BellSouth. The Consumers' Utility Counsel Division of the Governor's Office of Consumer Affairs intervened in the matter and appeared at the hearing. On September 17, 1999,

Docket No. 6865-U

Page 1 of 2

MCI and BellSouth filed Initial Briefs. On September 24, 1999, MCI and BellSouth filed Reply Briefs and Proposed Orders.

The Hearing Officer issued a Recommended Decision on February 25, 2000. The Hearing Officer recommended that the Commission grant the relief that MCI sought in both paragraphs (1) and (2) above. The Commission has considered the Findings of Fact, Conclusions of Law and recommendations by the Hearing Officer, and finds and concludes that they should be adopted.

WHEREFORE IT IS ORDERED, that the Commission hereby adopts the Findings of Fact, Conclusions of Law included in the Hearing Officer's Recommended Decision.

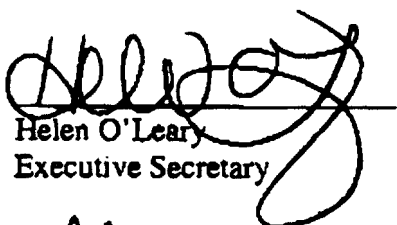
ORDERED FURTHER, that MCI is not recreating MegaLink service as provided by Attachment III, Section 2.3 of the Agreement.

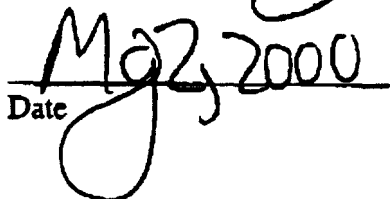
ORDERED FURTHER, that BellSouth is ordered to provide MCI with a credit equal to the difference between the price of the T1s that MCI ordered from the BellSouth access tariff and the price of a DS1 loop transport combination for the period November 1997 until the date of BellSouth's conformance with the Agreement.


ORDERED FURTHER, that a motion for reconsideration, rehearing, or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 21st day of March, 2000.


Helen O'Leary
Executive Secretary


Date


Bob Durden
Chairman

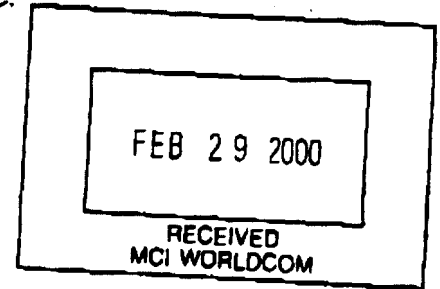

Date

NANCY G. GIBSON, Esq., P.C.

3325 IVANHOE DRIVE
ATLANTA, GEORGIA 30327

(404)231-9134

February 25, 2000



Via U.S. Mail and E-Mail (heleno@psc.state.ga.us)

Ms. Helen O'Leary
Executive Secretary
Georgia Public Service Commission
47 Trinity Ave., 5th floor
Atlanta, GA 30334

In Re: Docket No. 6865-U; Complaint of MCI Access Transmission Services, LLC to
Obtain DS1 Loop Transport Combination at UNE Prices.

Dear Ms. O'Leary:

Enclosed for filing with the Georgia Public Service Commission is my
Recommended Decision as a Hearing Officer in the above-referenced case. Please let me
know if you have any questions or if I can provide any additional information to you or
the Commissioners.

Sincerely,


Nancy G. Gibson

Cc with enclosure: parties of record

**BEFORE THE GEORGIA PUBLIC SERVICE COMMISSION
STATE OF GEORGIA**

DOCKET NO. 6865-U

Appearances:

For MCI Metro Access Transmission Services, LLC:

Dulaney L. O'Roark, III, Attorney
Martha McMillin, Attorney

For BellSouth Telecommunications, Inc:

Fred McCallum, Attorney
Lisa S. Foshee, Attorney

For the Commission Staff:

Daniel Walsh, Attorney

For the Consumers' Utility Counsel:

Ron Jackson, Attorney

**In Re: Complaint of MCImetro Access Transmission Services, LLC to
 Obtain DS1 Loop/Transport Combinations at UNE Prices.**

RECOMMENDED DECISION

On January 22, 1999, MCImetro Access Transmission Services, LLC ("MCI") filed a Complaint against BellSouth Telecommunications, Inc. ("BellSouth" or "BST") for its alleged breach of the parties' Interconnection Agreement ("Agreement") approved by the Georgia Public Service Commission ("Commission"). This matter was assigned to a Hearing Officer and a hearing was scheduled for August 26, 1999. MCI sponsored Joseph Gilan and Ronald Martinez in support of its complaint. BST presented witnesses Alphonso J. Varner and Jerry Hendrix in response. All parties were given an opportunity to file Initial Briefs on September 17, 1999 and Reply Brief and Proposed Orders on September 24, 1999.

Jurisdiction and Allegations

The Commission has jurisdiction over the claims asserted in the Complaint under the Telecommunications Act of 1996, 47 U.S.C. Sections 251, 252, under O.C.G.A. Section 46-2-20 and under the Commission's April 9, 1997 Order Approving Arbitrated Interconnection Agreement in this docket (Jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper").

MCI's Complaint requested that Commission award the following relief:

- (1) Declare that the DS1 loop transport combination requested by MCI does not recreate BellSouth's MegaLink service or any other BellSouth retail service;
- (2) Order BellSouth to provide MCI with a credit equal to the difference between the price of the T1s that MCI ordered from the BellSouth access tariff to provision its customers' service from MCI switches and the price of a DS1 loop transport combination, for the period from November 1997 until the date of BellSouth's conformance with the Agreement;
- (3) Order BellSouth to provision all future requests by MCI for DS1 loop transport combination as UNE combinations at the UNE rates specified in the Agreement; and
- (4) Order such other and further relief as the Commission deems just and proper. (Complaint p. 8).

Background and Arbitration Order

This case involves a dispute between MCI and BellSouth regarding the price of a specific unbundled network element ("UNE") combination that MCI has been attempting to lease from BellSouth since November 1997. The UNE combination consists of a DS1 local loop and DS1 dedicated transport ("DS1 combo") terminated at a wire center

serving a MCI switch. A DS1 loop is a four-wire facility and associated electronics that connects a customer's premises to the customer's serving wire center. A DS1 loop provides 1.544 megabits per second of digital bandwidth, which is the equivalent of 24 voice grade channels. DS1 dedicated transport is a four-wire interoffice facility and associated electronics that provides a 1.544 MBPS digital connection between the customers' serving wire center and another BellSouth wire center or local exchange company's wire center. Both the DS1 loop and the DS1 transport are available to MCI as unbundled network elements under the Agreement.

The DS1 combo at issue is a combination of these two elements to and from a continuous 1.544 MBPS transmission path between a customer location and the wire center serving MCI's local switch. In this case, MCI uses the DS1 combo to connect its business customer to the wire center serving its local switch so that MCI can provide the customer with a full-featured competitive local exchange service. This service includes dial tone and local calling provided by MCI's switch, vertical features provided by MCI's switch, and access provided by MCI's switch to operator services, 911 service and interexchange service. (MCI's Brief p. 6)

MCI contends that it has been attempting to lease DS1 combos out of its Agreement with BellSouth since November 1997. MCI witness Martinez testified that initially BellSouth stated that it would accept orders for such combinations, but then changed its position and said that because the DS1 "recreated" a BellSouth service, MCI would have to buy the elements separately and combine them itself in an MCI collocation space. MCI claims that it was then forced to order T-1 circuits from BellSouth's access tariff using the Access Service Request method permitted in accordance with the Agreement.¹ (Brief of MCI p. 7) The cost of these circuits averages approximately \$435 per month, versus the price of approximately \$150 per month to which MCI claims it is entitled under the UNE combination pricing in the Commission's Order Establishing Cost-Based Rates. MCI placed the orders for these circuits using Access Service Requests ("ASRs").

¹ By letter dated October 12 1998, MCI renewed its request that BellSouth provide DS1 combos at UNE prices. MCI Exhibit 3 to Prefiled Testimony of Martinez. BellSouth responded by letter dated November 2, 1998 stating that the DS1 combo recreated BellSouth's MegaLink service and therefore BellSouth would charge the resale price.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pricing of UNE Combinations

Several portions of the Agreement address the provisioning of network elements on a combined basis.

Attachment III, Section 2.3

MCIm may use one or more Network Elements to provide any feature, function, capability, or service option that such Network Element(s) is capable of providing or any feature, function, capability, or service option that is described in the technical references identified herein; provided, however, that if MCIm recombines Network Elements to create services identical to BellSouth's retail offerings, the price MCIm would pay to BellSouth for those rebundled services shall be identical to the price MCIm would pay using the resale discount, and these de facto resold services shall be provided to MCIm under the same terms and conditions applicable to resale, including the same application of access charges and the imposition of joint marketing restriction. In this context, "identical" means that MCIm is not using its own switching or other functionality or capability together with the Network Elements to product its service. The foregoing is subject to change by final determination of the GPSC in the generic docket addressing recombination, in which event the parties will conform this provision to such determination.

Attachment III, Section 2.4

Subject to the provision of Section 2.3 of this Attachment, BellSouth shall offer each Network Element individually and in combination with any other Network Element or Network Elements in order to permit MCIm to provide Telecommunications Services to the subscribers.

Part B of the Agreement defines "Combinations" as provisioned by ILEC of two or more connected Network Elements ordered by MCIm to provide its telecommunication services in a geographic area or to a specific customer and that are placed on the same order by MCIm.

Attachment III, Section 2.6

With respect to Network Elements and services in existence as of the Effective Date of this Agreement, charges in Attachment 1 are inclusive and no other charges apply, including but not limited to any other consideration for connecting any Network Element(s) with other Network Element(s).

Attachment I of the Agreement established recurring and nonrecurring charges for the UNEs (including DS1 and DS1loop transport) listed in Table 1 to the attachment.

The parties agreed that these were interim prices that would remain in effect until the Commission determined otherwise. Interim prices were subject true up based on a final order of the Commission; specifically including the final order issued in the generic cost study proceeding. The Commission issued its UNE Cost Order in Docket No. 7061-U on December 16, 1997. The recurring charge for 4-wire DS1 loops was set at \$64.52, with a nonrecurring charge of \$429.98 for the first loop and \$268.18 for additional loops. DS1 dedicated interoffice transport was priced at \$78.47 per month (plus \$0.4523 per mile), with a nonrecurring charge of \$147.07 for the first circuit and \$111.75 for additional circuits.

MCI points out that Section 2.6 follows three sections dealing with UNE combinations. Section 2.6 expressly states that the UNE prices in the Agreement are inclusive and no other charges are to apply. Therefore, MCI asserts that because UNE prices are the only charges that apply to UNE combinations, they are to be priced by summing the UNE rates. That is, to determine the price for a UNE combination, the recurring and nonrecurring prices for each element must be added to determine the total price. (Brief of MCI p. 11 - 12).

On the contrary, BellSouth argues that there are no prices for UNE combinations set forth in the Agreement. BellSouth agrees that Section 2.4 of Attachment III requires it to provide network combinations, but asserts that it did not provide the prices for such combinations. BellSouth points to the last sentence Section 2.3 which states that "the foregoing is subject to change by final determination of the GPSC in the generic docket addressing recombination, in which event the parties will conform this provision to such determination" as an expression of the fact that the Commission was expected to open a docket to determine the appropriate prices for UNE combinations. (BellSouth Brief p. 8)

The agreement provides that BellSouth has a general obligation to provide MCI with combined network elements at cost based rates. Based on the evidence presented, the parties considered all of the issues, particularly one as important as pricing UNE combinations which is the basis for enabling potential competitors to offer competitive services. It is unreasonable to believe that the MCI would intentionally allow for the omission of pricing standards for UNE combinations. Moreover, listing each and every potential combination would be virtually impossible and if not improbable from a

CLEC's point of view in a competitive environment. As mentioned by MCI, the last sentence of Section 2.5 does not suggest that any UNE combination issues had not been resolved but rather that they might later be revisited. Except when a retail service has been recreated, sum-of-the UNEs pricing is the logical and intended pricing application to be used pursuant to the Agreement.

Recreation of MegaLink

BellSouth asserts that MCI is merely attempting to circumvent the Commission's Order which requires a competitor to pay the resale rate if the service is the same as a service already offered by BellSouth, i.e. Magellan Service ("MegaLink"). MegaLink is a service for the transmission of digital service signals only and uses only digital transmission facilities. MegaLink provides for the simultaneous two-way transmission of isochronous digital signals at DS1 speeds of 1.544 Mbps. (BST Brief p. 11)

BellSouth maintains that MCI is not entitled to the DS1 loop and transport combination at the sum of UNE prices because Section 2.3 specifically provides that if the combination creates a service "identical to BellSouth's retail offering," then MCI is obligated to pay the resale discount for the combination. In the Agreement "identical means that MCI is not using its own switching or other functionality or capability together with the unbundled elements in order to produce its service." BST asserts that the DS1 loop and transport combination that MCI is seeking under the Agreement is "identical" to BellSouth's MegaLink Service and therefore the combination "recreates" a retail service that BellSouth offers and constitutes a de facto resold service to which resale prices would apply.

MCI claims that the use of a DS1 combo as a high speed digital loop to connect an MCI customer to a wire center serving an MCI local switch as part of the provision of full-featured, switch-based local exchange service does not recreate any BellSouth retail service. MCI also relies on Section 2.3 which it believes makes it clear that the only exception to the sum-of-the-UNEs pricing for UNE combination occurs when UNEs are combined "to recreate services identical to BellSouth's retail offerings." MCI points to the narrow definition of the term "identical" to include only situations in which MCI is not using its own switching or some other functionality or capability together with the

UNE combination in question to produce MCI's service. MCI's argues that the definition creates a safe harbor for MCI if it uses its own switching (or other functionality) together with the UNE combination to create the MCI service. When the UNE combination is used in conjunction with MCI's switching to produce MCI service no recreation occurs. (MCI Brief p. 13)

As pointed out by MCI, in this case MCI is seeking to provide a competitive local exchange service to business customers using the DSI combo to provide a high capacity local loop to connect the customer to MCI's switch, from which the whole array of services and features are provided. MCI claims that because it is using the functionality provided by its local switch as a major component of the finished service provided to the customer, there is no basis to claim that the local service provided by MCI "recreates" BST's local service. From the customer's point of view, it is buying local service – it is not buying one piece part consisting of the local loop and another piece part consisting of switching and switch-based features and functions. (MCI Brief p. 17)

MCI's interpretation of Section 2.3 is correct. The definition created by the Commission was intended to inspire innovation and creation of new services using facilities other than that of the incumbent. BellSouth actively and successfully pursued an exception to the requirement that UNEs be made available.² In accordance with the position previously supported by BellSouth, the Commission created an exception to the rule for provisioning UNEs. That provision requires very specifically that if the CLEC service is "identical", meaning not using its own switching capability, then the UNE pricing is appropriate. Further, as Staff pointed out through its cross examination, it would not be possible for a service to be "identical" to a BellSouth service and not be comprised entirely of network elements obtained from BellSouth. (Tr. 73)

As demonstrated by MCI, MegaLink merely provides the transmission channel between two locations; MegaLink is not a switched service and does not provide dial tone to the customer. In contrast, MCI is providing a public switched service that involves the use of MCI's local switch. MCI adds its own switch which is exactly what was intended

² The prefiled testimony of MCI witness Gilan contained several excerpts from statements by BST witnesses in previous dockets limiting its objections to the situation where an entrant intended to offer services comprised entirely of network element obtained from BellSouth. Tr. pp. 86 –87.

by the Commission and included in the Agreement. Under the plain terms of Section 2.3, MCI is not recreating MegaLink.

Change in Applicable Law

BST argues that it was not obligated to combine UNEs for MCI during the relevant time period in which MCI requested the DSL loop and transport combination. BST claims that nowhere in the Agreement is BST required to provide UNE combinations combined by BellSouth at the sum of the UNE rates. BellSouth admits that at the time the parties signed the Agreement in April of 1997, the law still obligated BST to provide UNE combinations pursuant to FCC Rule 51.315(c) - (f).³ However, BST claims that overriding all of the specific provisions in the Agreement is the obligation to construe the Agreement in accordance with applicable law.

Section 6 of the Agreement provides in relevant part:

All terms, conditions and operations under this Agreement shall be performed in accordance with all applicable laws, regulations and judicial or regulatory decisions of all duly constituted governmental authorities with appropriate jurisdiction, and this Agreement shall be implemented consistent with the applicable rules and regulations of the FCC and state regulatory body in effect.

Section 7 of the Agreement provides:

This Agreement shall be governed by and construed in accordance with applicable federal law and the laws of the State of Georgia, without regard to its conflicts of laws principles

BellSouth testified that in July 1997, approximately three months after the parties executed the Agreement, the law applicable to UNE combinations changed. In September 1996, the Eighth Circuit had stayed portions of the FCC's Rules contained in the First Report and Order in CC Docket 96-98.⁴ On July 18, 1997 the Eighth Circuit vacated the pricing rules and Rule 51.315 (c) - (f) which required ILECs to combine network elements for a requesting carrier. BellSouth argues that no party appealed that decision to the Supreme Court; thus, as of July 1997, the law did not obligate BST to combine UNEs for CLECs. (BellSouth Post-Hearing Brief, p.5)

³ Section 2.4 of Attachment III provides that " BellSouth shall offer each Network Element individually and in combination..."

Section 2.4 of the Agreement states:

In the event that any final and nonappealable legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of MCI or BellSouth to perform any material terms of this Agreement, or in the event a judicial or administrative stay of such action is not sought or granted, MCI or BellSouth may, on thirty (30) days written notice (delivered not later than thirty (30) days following the date on which such action has become legally binding and has otherwise become final and nonappealable) require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the dispute shall be resolved in accordance with Section 23 (Dispute Resolution Procedures) of this Agreement.

MCI argues that the requirements of this section have not been met. MCI claims that the Eighth Circuit decision is not "final and nonappealable" but that 51.315 (c) - (f) was raised in the Supreme Court. Further, MCI notes that the Eighth Circuit directed the parties to address whether or not it should take any further action with respect to Rule 51.315 (c) - (f). MCI also points out that BellSouth never formally requested renegotiation as required by Section 2.4 nor did it request the Commission to intervene and resolve the dispute as mandated by this provision.

Moreover, MCI contends that nothing in Part A, Section 6 states that changes in the law automatically become part of the Agreement and alter its terms. To the contrary, Section 6, according to MCI, plainly means that the Agreement must be carried out in manner that does not violate the law.

MCI's reference to Hornbook law is instructive.

If supervening governmental action prohibits a performance or imposes requirements that make it impracticable, the duty to render that performance is discharged . . . The fact that it is still possible for a party to perform if he is willing to break the law and risk the consequences does not bar him from claiming discharge.

The Eighth Circuit's action was not final and nonappealable relinquishing the obligation to provide UNE combinations in accordance with the Agreement.

The duty to perform in accordance with the provision would not be in conflict with the governing law. The change in the law does not prohibit BST from performing.

⁴ Specifically, pricing rules 51.501 - 51.515, 51.601 - 51.611 and the pick and chose rule 51.809.

Therefore, BellSouth has a duty under the Agreement to provide the DS1 loop and transport combination at the logical interpretation of the sum-of-the-elements rate.

Perhaps more importantly, even if Section 2.4 did relieve BST of its obligation to provide the DS1 loop and transport with respect to 315 (c)-(f), 315(b) requires BellSouth to provide UNE combination that it "currently combines." Rule 315(b) has been expressly affirmed by the Supreme Court.⁵

ORDERING PARAGRAPHS

The Hearing Officer certifies the record in this docket to the Commission and issues this recommendation pursuant to O.C.G.A. §§ 46-2-58(d) and 50-13-17(a). Based upon the evidence, the Hearing Officer makes the following disposition of this proceeding:


WHEREFORE IT IS RECOMMENDED, that MCI is not recreating MegaLink service as provided by Attachment III, Section 2.3.

RECOMMENDED FURTHER, that BellSouth be ordered to provide MCI with a credit equal to the difference between the price of the T1s that MCI ordered from the BellSouth access tariff and the price of a DS1 loop transport combination for the period November 1997.

RECOMMENDED FURTHER, that jurisdiction over this matter is expressly retained for the purpose of entering such further Order or Orders as the Commission may deem just and proper.

RECOMMENDED FURTHER, that any motion for reconsideration or rehearing in this case shall not have the effect of staying the Order of Commission, except insofar as the Commission may otherwise provide.

This 17th day of January, 2000.


Nancy G. Gibson
Hearing Officer for the
Georgia Public Service Commission

⁵ AT&T Corporation v. Iowa Utilities Board, 119 S. Ct. 721 (1999).

DOCKET NO. 6865-U**SERVICE LIST**

This is to certify that I have this day served a copy of the foregoing Recommended Decision upon the parties listed below by depositing same in the United States Mail addressed as follows:

Helen O'Leary*
Executive Secretary
47 Trinity Ave.
5th Floor
Atlanta, GA 30334

Gilbert Bentley*
Georgia Public Service Commission
47 Trinity Ave.
6th Floor
Atlanta, GA 30334

Mr. Jim Hurt
Office of Consumer Affairs
2 Martin Luther King, Jr. Drive
Plaza Level, East Tower
Atlanta, GA 30334

William Atkinson
Sprint Communications Company
3100 Cumberland Circle
Atlanta, GA 30339

Mr. Fred McCallum, Jr.
BellSouth Telecommunications
Room 376, 125 Perimeter Center - West
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Ms. Suzanne Ockleberry
AT&T Communications
Room 4048, 1200 Peachtree St., N.E.
Atlanta, GA 30309

Ms. Lisa Spooner Foshee
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Mr. David I. Adelman
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Dulaney L O'Roark, III
Sr. Attorney
MCI WorldCom
Six Concourse Parkway
Suite 3200
Atlanta, GA 30328

Dan Walsh,
Assistant Attorney General
Georgia Department of Law
40 Capitol Square
Atlanta, GA 30334

This 25th day of January 2000

*Via E-mail or Hand Delivery

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for arbitration
concerning complaint of MCImetro
Access Transmission Services LLC
for enforcement of
interconnection agreement with
BellSouth Telecommunications,
Inc.

DOCKET NO. 981121-TP
ORDER NO. PSC-99-1089-FOF-TP
ISSUED: May 27, 1999

The following Commissioners participated in the disposition of
this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JULIA L. JOHNSON
E. LEON JACOBS, JR.

APPEARANCES:

RICHARD MELSON, ESQUIRE, Hopping Green Sams & Smith,
P.A., P.O. Box 6526, Tallahassee, Florida 32314.
On behalf of MCImetro Access Transmission Services LLC.

J. PHILLIP CARVER, ESQUIRE, 675 West Peachtree Street,
#4300, Atlanta, Georgia 30375.
On behalf of BellSouth Telecommunications, Inc.

MARTHA CARTER BROWN, ESQUIRE AND JOHN MILLER, ESQUIRE,
Florida Public Service Commission, 2540 Shumard Oak
Boulevard, Tallahassee, Florida 32399-0850.
On behalf of the Commission Staff.

ORDER RESOLVING COMPLAINT

BY THE COMMISSION:

BACKGROUND

On September 14, 1998, MCImetro Access Transmission Services
LLC (MCI) filed a complaint for enforcement of its Interconnection
Agreement with BellSouth Telecommunications, Inc. (BellSouth).
BellSouth filed its Answer and Response to MCI's Petition on

October 5, 1998. We conducted an evidentiary hearing on the complaint on February 3, 1999. The issues we addressed at the hearing concern the appropriate provisioning and pricing of a 4-wire DS1 loop and DS1 dedicated transport network element combination under the agreement. Our decision on those issues is explained in detail below.

DECISION

MCIm complains that BellSouth has refused to provide the combination of a DS1 loop and a DS1 Transport at the sum of the individual unbundled network element (UNE) prices, as their interconnection agreement requires. MCIm asserts that it has been forced to purchase higher priced T-1 circuits from BellSouth's access tariffs to provide high-speed, full-service telecommunications to its business customers. MCIm asks that we order BellSouth to provide the network element combination to MCIm at the simple sum of UNE prices and require BellSouth to reimburse MCIm for the difference between the DS-1 combination price and the T-1 price MCIm has been paying.

BellSouth responds that the DS1 loop and transport combination MCIm demands recreates a BellSouth retail service called "MegaLink". According to BellSouth, the parties' interconnection agreement and this Commission's policies regarding combinations of unbundled network elements (UNEs) do not require it to provide this combination at the sum of the UNE prices. BellSouth relies on our Order No. PSC-98-0810-FOF-TP, issued June 12, 1998, in Docket No. 971140-TP, which addressed a number of issues concerning the treatment of UNE combinations in AT&T Communications of the Southern States, Inc.'s (AT&T) and MCIm's interconnection agreements with BellSouth. In Order No. PSC-98-0810-FOF-TP, page 25, we said:

MCIm and BellSouth shall negotiate the price for those network element combinations that recreate an existing BellSouth retail service, whether or not in existence at the time of MCIm's order.

Because the parties did not agree that the combination MCIm requested recreated BellSouth's MegaLink service, they never negotiated a price. BellSouth contends that the parties are required to negotiate the price for the combination, and BellSouth

asserts that the price should be set at the wholesale price of MegaLink service.

Thus, to resolve this dispute we must answer this question: Does the combination of unbundled network elements consisting of 4-wire DS1 loops and DS1 dedicated transport recreate an existing BellSouth retail service known as MegaLink? If it does not, then the parties' interconnection agreement, and our Order No. PSC-98-0810-FOF-TP interpreting the relevant portions of the agreement, clearly indicate that BellSouth must provide the combination to MCIm at the sum of the UNE prices. If it does, then we must direct the parties to negotiate a price.

The DS1 combination and MegaLink

MCIm witness Martinez described a DS1 loop as a four-wire facility and associated electronics that connect a customer's premises to the customer's serving wire center. A DS1 loop provides 1.5 million bits per second (MBPS) of bandwidth, which is equivalent to 24 voice grade channels. Witness Martinez described DS1 dedicated transport as a four-wire interoffice facility and associated electronics that provide a 1.5 MBPS connection between the customer's serving wire center and a point of interconnection at MCIm's local switch location. Witness Martinez testified that MCIm intends to use the DS1 loop/ DS1 transport combination to connect a business customer's premises to a MCIm Class 5 local switch, which MCIm uses to provide local service to the customer, including dial-tone, local calling, vertical features, access to operator services, access to 911 service, and switched access to the customer's preferred long distance carrier.

BellSouth witness Milner described MegaLink as a service by which digital signals are transmitted over digital facilities at a rate of 1.544 MBPS to and from a customer's premises. He explained that BellSouth offers MegaLink through its Private Line Services Tariff, but functionally MegaLink is the same as a DS1 loop and dedicated transport combination. He argued that the functional equivalence of the element combination is what determines the recreation of a retail service, and the proposed combination of UNEs and MegaLink service provide identical functionality regardless of whether MCIm connects either to MCIm's switch.

MCIm's witnesses Martinez and Gillan acknowledged that the DS1 loop/DS1 dedicated transport combination is functionally the same as MegaLink, but also pointed out that there are four possible ways

to obtain this functionality: (1) by purchasing a DS1 loop UNE and DS1 transport UNE out of the Interconnection Agreement, and MCIm combining these themselves in a collocation space; (2) by purchasing BellSouth's MegaLink service; (3) by purchasing T-1 circuits from BellSouth's access tariff; and (4) by purchasing the combination of a DS1 loop and DS1 dedicated transport. With the exception of the pricing on option (4), BellSouth witness Hendrix agreed that BellSouth has the capability of providing this functionality in four different ways.

Witness Martinez disagreed, however, that a MegaLink circuit provided to an end use customer by BellSouth and a DS1 loop/DS1 dedicated transport combination used by MCIm as part of an MCIm switch-based local service offering are in any way equivalent in the eyes of the customer. According to MCIm, one must compare the service to be offered using the UNE combination to the BellSouth retail service in order to determine if the former "recreates" the latter. In MCIm's view, the combination in question here does not recreate any existing BellSouth retail service within the meaning of Order No. PSC-98-0810-FOF-TP.

We cannot accept the position that identical functionality alone determines whether a competing carrier's use of an unbundled network element combination "recreates" an incumbent carrier's retail service. If that were so, almost any element combination could be said to "recreate" some retail service. Such a standard would severely restrict competitive carriers' use of UNEs to enter local telephone markets, contrary to the intent of the Telecommunications Act of 1996 and the FCC's rules implementing that Act.¹ We believe we must evaluate a claim that a UNE combination recreates a retail service much more comprehensively. Section 364.02(11), Florida Statutes, states that "[s]ervice is to be construed in its broadest and most inclusive sense," and we need to consider other aspects of the services in question beyond just the functionality of the facilities involved. We need to consider

¹ Witness Gillan argued that if the Commission adopts BellSouth's view, then BellSouth, in its own discretion, has the ability to avoid its unbundling and network element combining obligations simply by always having services that equal the network elements. While we do not believe that BellSouth will attempt to avoid its obligations in this fashion, we do agree that as the number of BellSouth's service offerings increases, the potential for this type of conflict could increase.

both the nature of the incumbent's tariffed retail service as well as the competitor's intended use of the requested UNE combination to determine whether the one recreates the other.

In this case, one of the major differences between MCI's intended use of the DS1 combination and BellSouth's MegaLink service is that MCI will use it with its own Class 5 local switch to provide a full range of local telecommunications to its customers. Witness Gillan testified that BellSouth has continuously objected to a particular network configuration, the so-called network element "platform," where the entrant provides its service entirely using network elements obtained from BellSouth. Witness Gillan pointed to the direct testimony of BellSouth witness Robert Scheye in the AT&T/MCI Arbitration proceeding, which stated:

ALECs should be able to combine BellSouth provided elements with their own capabilities to create a unique service. However, they should not be able to use only BellSouth's unbundled elements to create the same functionality as a BellSouth existing service.

Here, MCI intends to use the BellSouth UNEs in concert with its own facilities, its Class 5 switch. As MCI witness Gillan stated:

To determine whether MCI "recreates" a BellSouth service requires a comparison that considers the service MCI offers. The service offered by MCI uses network elements in exactly the way BellSouth has (until now) argued that it should -- in combination with MCI's own facilities-- and BellSouth's instant claim that even this arrangement "recreates" a BellSouth service should be rejected.

The inconsistency of BellSouth's position is not the important thing here. It is the fact that MCI will connect BellSouth's DS1 loop and DS1 dedicated transport to its own facilities to provide telecommunications service. It cannot be said from the evidence in the record that MCI will provide telecommunications service to its customers entirely from a combination of BellSouth's network elements that recreate a retail service.

The evidence in the record also indicates that the total service BellSouth offers through its MegaLink tariff is not consistent with MCIm's intended use of the UNE combination. BellSouth offers MegaLink service only to private line customers. Although BellSouth's witness Milner stated that the tariff clearly contemplates that the transport functionality may be used in conjunction with switches, the evidence does not support this assertion. Witness Milner admitted that the terms "local switch" or "toll switch" do not appear in any provisions of the MegaLink tariff, but he argued that Section B7.1.2.D of the tariff, regarding the connections that may be made to the MegaLink service, uses the term "Customer-Provided Communications Systems" which he believes includes switches. The tariff defines "Communications Systems," however, as follows:

The term "Communications Systems" when used in connection with communications systems provided by an Other Carrier (OC) denotes channels and other facilities furnished by the OC for private line services as such OC is authorized by Federal Communications Commission or Public Service Commission to provide.

Witness Milner agrees that MCIm would be considered an Other Carrier. Thus the tariff would require an "Other Carrier" such as MCIm to connect MegaLink to facilities used to provide private line services. As MCIm argues in its brief, it "is offering a switched-based local exchange service that can be used to call any telephone in the world. It is the antithesis of a private line service."

BellSouth witness Milner also testified that MegaLink can be used to connect an end user customer to a BellSouth central office, or to another end user customer, or to connect two of BellSouth's central offices. Again, the evidence does not support this statement. As MCIm pointed out at the hearing, Section B2.1.1 of BellSouth's Private Line Services Tariff states:

Private line service is the provision of Company facilities for communication between specified locations of customers or authorized users.

The tariff further defines "authorized users" as:

a person, firm or corporation (other than the customer) who may communicate over a private line or channel according to the terms of the tariff and (1) on whose premises a station of the private line service is located or (2) who receives from or sends to the customer such private line or channel communications relating solely to the business of the customer. An authorized user must be specified in the service contract.

The evidence shows that BellSouth's private line MegaLink service is intended to connect locations of the same customer, or a customer and an affiliated authorized user. MCIm intends to connect unrelated business customers to the public switched network to provide local service not to provide private line service. Therefore, the language in BellSouth's Private Line Services tariff would prohibit MCIm from providing the service it intends to provide.

Conclusion

Based on the evidence in the record, we find that the combination of UNEs consisting of a 4-wire DS1 loop and DS1 dedicated transport does not recreate BellSouth's MegaLink service. MCIm's intended use of the elements is inconsistent with the conditions of the MegaLink service tariff. Since Section 251(c)(3) of the Telecommunications Act of 1996, states that "[a]n incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service," and since BellSouth is required to provide UNE combinations under the terms of the parties' agreement, we direct BellSouth to provide this combination at the sum of the individual network elements.

Refund

MCIm requests that we order BellSouth to refund the difference between the access tariff prices for the T-1 circuits that MCIm has been ordering and the price for the UNE combination of a DS1 loop and DS1 transport. MCIm witness Martinez stated that as of the date direct testimony was filed, the accumulated difference in price was over \$3 million, and was continuing to increase at a rate of over \$300,000 per month.

BellSouth argues in its brief that:

Clearly, this case is not a situation in which a refund is appropriate under the normal criteria (i.e., because the customer did not receive service, was not charged for service at the tariffed rate, or had some legitimate complaint regarding the quality of service).

BellSouth witness Hendrix also argued that MCIm ordered T-1 circuits from the access tariff and has used them accordingly. He stated that MCIm's argument that it ordered these circuits via the access tariff because it could not purchase UNEs is not true. He contended that MCIm could have purchased UNEs and combined them in their collocation space, or they could have purchased MegaLink service at the tariffed rate less the applicable resale discount. While this may be correct, it is irrelevant. The parties' interconnection agreement entitles MCIm to order the UNE combination from BellSouth at the price defined in the contract. BellSouth is contractually required to provide it, regardless of other options available to MCIm.

BellSouth is also contractually required to provide a refund where it has failed to comply with the terms of its agreement. BellSouth acknowledged that MCIm attempted to order the DS1 loop/DS1 dedicated transport combination in late 1997. Since BellSouth did not provide it, it now must provide the refund pursuant to the interconnection agreement.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc. shall provide the DS1 loop and DS1 dedicated transport combination to MCImetro Access Transmission Services LLC, pursuant to the terms of its interconnection agreement at the sum of the unbundled network element prices. It is further

ORDERED that BellSouth Telecommunications, Inc. shall provide a refund to MCImetro Access Transmission Services LLC of the difference between the price of the combination and the access tariff price of a T1 circuit that MCImetro Access Transmission Services LLC has purchased since November of 1997. It is further

ORDERED that this docket shall be closed.

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DOCKET NO. 981121-TP
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By ORDER of the Florida Public Service Commission this 27th
day of May, 1999.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: /s/ Kay Flynn
Kay Flynn, Chief
Bureau of Records

This is a facsimile copy. A signed
copy of the order may be obtained by
calling 1-850-413-6770.

(S E A L)

MCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review in Federal district court pursuant to the Federal Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6).